

*In the Matter of Paid Leave Bank Days*

CSC Docket No. 2012-3096

**(Civil Service Commission, decided May 16, 2012)**

In *Communications Workers of America v. New Jersey Civil Service Commission*, Docket No. A-1110-10T3 (App. Div. January 18, 2012) (*CWA v. NJCSC*), the Appellate Division, Superior Court of New Jersey, reversed the adoption of *N.J.A.C.* 4A:6-1.2(l) and remanded to the Civil Service Commission (Commission) to consider whether the creation of Paid Leave Bank (PLB) days in various Memoranda of Agreements (MOAs) between the State and the Communications Workers of America (CWA), Local 195 of the International Federation of Professional and Technical Engineers (IFPTE), Local 518 of the New Jersey State Motor Vehicle Employees Union (SEIU), and the American Federation of State, County, and Municipal Employees (AFSCME) was contrary to existing law and could not be implemented without Legislative action and, in the event the Commission concludes that Legislative action is not necessary, whether other provisions of Title 11A (Civil Service Act) and Title 4A permit the adoption of a regulation that mirrors the provisions of the MOAs.

By way of background, in 2009, the State and the CWA, IFPTE, SEIU, and AFSCME entered into MOAs, modifying the parties' collective negotiations agreements, with such terms expiring on June 30, 2011. The MOAs provided, in pertinent part, that covered employees would take a total of 10 unpaid furlough days prior to July 1, 2010. In exchange for these unpaid furlough days, negotiations unit members were to be credited with up to 7 PLB days that could be utilized after July 1, 2010 for the duration of their employment with the State. These PLB days were in addition to the employee's regular annual vacation, sick, and administrative leave allotment. The MOAs provided in part:

2. The PLB days will be maintained separate and apart from banks of other paid leave and there will be no limitations on the carryover of days in the PLBs. Specifically, the carry over restrictions that are applicable to paid vacation and administrative leave days will not be applicable to the PLBs.

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4. At the time the employee retires, resigns or is otherwise separated from State service, either voluntarily or involuntarily, any unused days in an employee's PLB will be treated in accordance with the provisions of Article 22(G) of the parties' agreements [Vacation Leave]. If an employee dies prior to leaving State service with unused

paid leave days in his/her PLB, those days will be treated in accordance with Article 22(G)(4) of the parties' agreements.

In an effort to provide parity for as many State employees as possible, the former Chairperson of the Commission recommended the establishment of a Pilot Program for unrepresented employees similar to the agreed upon MOAs. In *In the Matter of Unpaid Furlough Days for Unrepresented Employees Pilot Program* (CSC, decided August 5, 2009) (*Unpaid Furlough*), the Commission indicated that a Pilot Program was necessary since there is no statutory or regulatory authority for the provision of unpaid furlough days or for the establishment of the PLB which provided for additional leave days other than those days statutorily prescribed. Similar to the MOAs, in *Unpaid Furlough*, the Commission indicated that since there was no provision in the rules for the establishment of a PLB, rules would be promulgated to govern the specifics regarding the administration of the PLBs.

Thereafter, on May 19, 2010, the Commission approved the publication of a proposed amendment to codify the PLB program under *N.J.A.C.* 4A:6-1.2, the vacation leave regulation, adding a new subsection (l). *See* 42 *N.J.R.* 1116(a) (June 21, 2010). The proposed amendment categorized PLB days as vacation days subject to the restrictions of *N.J.S.A.* 11A:6-2f ("Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only."). By letter dated August 20, 2010, the Governor's Office of Employee Relations (OER) and CWA made a joint request to the Commission for the promulgation of a regulation consistent with their MOA, to the extent a rule was necessary to implement the provisions of the MOA. On September 15, 2010, the Commission adopted the proposed amendment without change and it was codified as *N.J.A.C.* 4A:6-1.2(l). *See* 42 *N.J.R.* 2400(b) (Oct. 18, 2010).

Subsequently, CWA, IFPTE, and AFSCME appealed the adoption of *N.J.A.C.* 4A:6-1.2(l) to the Appellate Division, Superior Court, arguing that the Commission was not required by statute to characterize PLB days as vacation days and to treat them similarly. In the attached decision, *CWA v. NJCSC*, *supra*, the court emphasized that in adopting *N.J.A.C.* 4A:6-1.2(l) limiting the carryover of PLB days in the same manner as vacation leave, the Commission did not exceed the power delegated to it by the Legislature nor did it transgress the statute it was purported to effect. However, the court reversed the rule adoption and remanded the matter to the Commission to first consider whether the creation of the PLBs in the MOAs was contrary to existing law and could not be implemented without Legislative action. The court also indicated that if the Commission concludes that despite Legislative inactivity, PLB days may nonetheless be provided to State workers, it shall consider whether other provisions of Title 11A, *N.J.S.A.*, (Civil Service Act) and Title 4A, *N.J.A.C.*, permit the adoption of a regulation that mirrors the provisions of the MOAs.

## CONCLUSION

In this case, the Commission finds that the creation of the PLB in the MOAs was contrary to existing law and cannot be implemented without Legislative action. The Commission has been entrusted by the Legislature to designate leaves of absence. *N.J.S.A. 11A:6-1*. The Legislature has spelled out in detail the specific purposes for which paid leaves of absence may be granted to State employees and has dramatically limited the unused leave time which may be accumulated and carried over beyond the year in which the leave is earned. *N.J.S.A. 11A:6-1, et seq.* For example, the Commission's enabling legislation authorizes vacation leave to be used and carried over to the next succeeding year only, *N.J.S.A. 11A:6-2*; and paid administrative leave is authorized for personal reasons but must be used by the end of the year, *N.J.S.A. 11A:6-6*. Legislation specifically authorizes sick leave and its carryover, subject to a cap on payout. *N.J.S.A. 11A:6-2; 11A:6-16 and -19*.

The Civil Service Act does not permit adoption of a regulation that mirrors the PLB provisions of the parties' MOA. "As the administrative agency empowered to promulgate and enforce the Civil Service Act, the Commission's construction of the act and its regulations is entitled to great weight." *See Appleby v. State Civil Serv. Comm'n*, 190 *N.J. Super.* 249, 255 (App. Div. 1983). Since Title 11A does not provide for the establishment of any types of paid personal leave outside of administrative, sick or vacation leave, PLB days for an employee's personal use is contrary to existing law and cannot be implemented without Legislative action.

Consistent with the court's direction, the Commission has conducted a review of this matter and has determined, as it did during the rule making process, that there is no statutory authority for PLB days as provided in the MOAs within current Civil Service law. The court indicated that if the Commission concludes that despite Legislative inactivity, PLB days may nonetheless be provided to State workers, it shall consider whether other provisions of Title 11A, *N.J.S.A.*, (Civil Service Act) and Title 4A, *N.J.A.C.*, permit the adoption of a regulation that mirrors the provisions of the MOAs. The Commission concludes that the creation of the PLB banks cannot be implemented without legislative action and there is no provision of Title 11A that permits adoption of a regulation that mirrors the provisions of the MOA, *i.e.*, PLB days with unlimited carryover and cash-out.<sup>1</sup> Given the court's decision in *CWA v. NJCSC*, *supra*, and the Commission's determination today confirming the lack of statutory authority for PLB days, there is now no existing regulatory or statutory authority for the provision and administration of PLB days. Therefore, the Commission has proposed, at today's meeting, the repeal of *N.J.A.C. 4A:6-1.2(l)* as well as subsections (m) and (n), which implemented the PLB program in the State colleges and universities.

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<sup>1</sup> In light of this conclusion, it is not necessary for the Commission to consider the issue of whether any limitation on the carryover of PLB days would substantially impair contractual rights.

However, although there is no statutory authority for PLB days, the majority of State employees have utilized PLB days in Fiscal Years 2011 and 2012 and a minority of State employees still have remaining PLB days they have not yet utilized. As such, in the absence of statutory authority to grant PLB days, employees who have utilized PLB days may now be in a salary overpayment situation. It cannot be ignored that all State employees who have utilized PLB days at this juncture did so, in good faith, under the belief that such leave was authorized by regulation and based upon communications from this agency. Similarly, State appointing authorities granted such leave in good faith based upon the same information and communications. The fact that PLB days were ultimately found to lack statutory or regulatory authority should not be held against the employees given the prolonged and complex legal history of this matter.

*N.J.S.A. 11A:3-7c* states that when an employee has erroneously received a salary overpayment, the Commission may waive repayment based on a review of the case. Therefore, it is appropriate for the Commission to waive recoupment of any PLB time already used by State employees for Fiscal Years 2011 and 2012 and up to December 31, 2012. This would permit State employees who relied on the rule amendment and other communications from this agency, or who delayed using these days due to the litigation of this matter in the Appellate Division, as well as the Commission's deliberation in connection with the Appellate Division's remand, to avoid being unfairly placed in a salary overpayment situation.

### **ORDER**

Therefore, the Civil Service Commission concludes that although no statutory or regulatory authority exists for PLB days within current Civil Service law, there shall be no recoupment of any PLB time used or paid during Fiscal Years 2011 and 2012 and up to December 31, 2012.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.